In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

FEDERAL TRADE COMMISSION, PETITIONER

v.

FLOTILL PRODUCTS, INC., AND MRS. MEYER L. LEWIS, ALBERT S. HEISER, AND ARTHUR H. HEISER, AS OFFICERS OF SAID CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the Ninth Circuit that refused to enforce the first numbered paragraph of the Commission's cease-and-desist order.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 10–26) is reported at 358 F. 2d 224. The *per curiam* order of the court of appeals on rehearing *en banc*, amending the prior opinion (App. B, *infra*, pp. 27–28), is not yet reported. The opinions of the Federal Trade Commission (R. 66–119, 132–134)[1] are re-

[1] "R." refers to the two volume transcript of record in the court of appeals.

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ported at 1963–1965 CCH Trade Regulation Reporter Transfer Binder, ¶ 16,970.

JURISDICTION

The final decree of the court of appeals (App. C, *infra,* pp. 29–30) was entered on April 1, 1966. On June 20, 1966, the court of appeals, following the filing by the Commission on April 14, 1966, of a timely petition for rehearing, ordered that the case be reheard *en banc* (App. D, *infra,* p. 31). On August 15, 1966, the court, sitting *en banc,* entered an order modifying the earlier opinion and, as thus modified, concurring therein (App. B, *infra,* pp. 27–28). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a cease-and-desist order of the Federal Trade Commission is invalid because concurred in by only two of the three members of the agency who participated in the decision.

STATUTE, REORGANIZATION PLAN AND RULE INVOLVED

Section 1 of the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U.S.C. 41, provides in pertinent part:

> That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party * * * A vacancy in the com-

mission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

Section 1 of Reorganization Plan No. 4 of 1961, 75 Stat. 837, following 15 U.S.C. 41, provides in pertinent part:

> Section 1. Authority to delegate. (a) In addition to its existing authority, the Federal Trade Commission, hereinafter referred to as the "Commission", shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter: *Provided, however,* That nothing herein contained shall be deemed to supersede the provisions of section 7(a) of the Administrative Procedure Act (60 Stat. 241), as amended [Section 1006 (a) of Title 5].

Rule 1.7 of the Procedures and Rules of Practice for the Federal Trade Commission, as amended, 16 C.F.R. (Cum. Supp., Jan. 1, 1966) 1.7 provides:

> A majority of the members of the Commission constitutes a quorum for the transaction of business.

STATEMENT

After full administrative proceedings, the Federal Trade Commission held that the respondent Flotill

Products Inc. ("Flotill") had made payments in lieu of brokerage, in violation of Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)), and had granted discriminatory promotional allowances in violation of Section 2(d) of that Act (15 U.S.C. 13(d)). The Commission issued a cease-and-desist order against Flotill and three of its officer-stockholders (R. 62–65). Only three members of the Commission participated in the decision (R. 96).[2] All three concurred in the finding that Flotill had violated Section 2(d), but only two of the three joined in the ruling on the Section 2(c) violation, Commissioner Elman dissenting on this point (R. 97–114).

The Court of Appeals for the Ninth Circuit enforced the portion of the Commission's order relating to the Section 2(d) violation (in which all three Commissioners had concurred), but refused to enforce the portion of the order based upon the violation of Section 2(c) (App. A, *infra*, pp. 18–19). In an *en banc* decision on the latter issue, a closely divided court[3] ruled (*id.* at p. 14) that "absent statutory authority or instruction to the contrary, three members of a five member commission must concur in order to enter a binding order on behalf of the commission"; and it remanded the case on this issue "for further hearings

[2] Five Commissioners heard oral argument in the case, but two had retired before the Commission issued its decision (R. 119). During the interim Commissioner Riley was appointed to the agency, but he declined to participate in the case (R. 96, 133).

[3] A three-judge panel originally divided two-to-one on this point (App. A, *infra*, pp. 10–26). The *en banc* decision was five-to-four (App. B, *infra*, pp. 27–28).

to determine whether a majority of the Commission desire to enter such an order" (*id.* at p. 18).[4]

REASONS FOR GRANTING THE WRIT

1. The holding of the court below, that a Commission order is invalid if concurred in by only two of the three members of the agency participating in the decision, directly conflicts with the decision of the Court of Appeals for the Sixth Circuit in *Atlantic Refining Company* v. *Federal Trade Commission*, 344 F. 2d 599, certiorari denied, 382 U.S. 939. There, as in the present case, only three Commissioners participated in the decision, and only two of them concurred in the holding of violation and the issuance of the cease-and-desist order (344 F. 2d at 600–601). The court of appeals upheld the order, stating (*id.* at 607, footnote omitted): "The rules of the Federal Trade Commission since its inception have provided for decision by the majority of panels of three members. We believe this rule is within the Commission's power to make and is wholly valid." See, also, the recent decision of the Court of Appeals for the Fifth Circuit in *LaPeyre* v. *Federal Trade Commission* (No. 21787, decided September 13, 1966, reprinted in App. E, *infra*, pp. 32–42), in which the court, seemingly in dictum, noted the decision of the Ninth Circuit in

[4] The Commission's order was directed against Flotill and against three officers of the company (who owned and controlled it), both individually and in their representative capacities (R. 62–65). The court of appeals held that the Commission had no basis for entering an order against the officers individually, and deleted from the order the reference to them in that capacity (App. A, *infra*, p. 24). We are not seeking review of that modification of the order.

the present case but adopted the contrary ruling of *Atlantic Refining* (*id.* pp. 40–41).

This Court should resolve the conflict because it involves an important issue which directly affects the ability of the Commission properly to perform its regulatory functions. Due to vacancies in the membership of the agency, disqualification of individual commissioners in particular cases, protracted illness, etc., the Commission frequently is unable to muster more than three members to participate in the decision of a case; and in many of such cases the participating Commissioners are divided in their views. During the five fiscal years 1962 through 1966, there were 30 cases in which only three Commissioners participated in finding a violation and issuing an order; in 12 of these the agency divided two-to-one. (A list of these cases is set forth in App. F, *infra*, pp. 43–46.) [5]

To require the Commission to defer acting in such cases until four qualified members are available to participate would have unfortunate consequences. It

[5] One of the 12 cases is pending before this Court on petition for a writ of certiorari. *Purolator Products, Inc.* v. *Federal Trade Commission*, No. 61. Another is awaiting decision by the Court of Appeals for the Third Circuit. *Luria Brothers & Co., et al.* v. *Federal Trade Commission*, No. 14,402. See, also, *LaPeyre* v. *Federal Trade Commission*, discussed in the text *supra*, where the court recognized the authority of such a divided panel to enter a valid order, and *Forster Mfg. Co.* v. *Federal Trade Commission*, 361 F. 2d 340 (C.A. 1), where the court refused to decide the question because it had not been timely raised. One of the cases in which the decision was concurred in by only two of the three participating Commissioners was before this Court in *Federal Trade Commission* v. *Borden Company*, 383 U.S. 637. See record on appeal, No. 106, O.T. 1965, pp. 76, 97, 98, 128.

would unnecessarily delay the disposition of a substantial number of cases, and thus permit continued violations of the important statutes that the Commission enforces. Moreover, the court of appeals' decision permitting three members of the Commission to enter an effective order only if they all concur creates an anomalous situation. Where only three members are participating, the Commission can not know whether it has the authority to decide a case until after it has heard argument and voted. This would result in a great waste of effort on the part of the members of the agency and its staff; for many cases would be presented to a panel of the Commission which subsequently proved unable to decide them.

2. In view of the direct conflict of decisions and the obvious importance of the question, there is no occasion to develop at this stage the arguments showing that the decision below is erroneous. In brief, the reasons for that conclusion are as follows:

A general principle governing the functioning of governmental bodies composed of more than one person is that "unless the number necessary to constitute a quorum is fixed by law * * * a majority of the persons constituting such body shall constitute such quorum and may transact the business for which it is organized" (*Frischer & Co.* v. *Bakelite Corp.*, 39 F. 2d 247, 254 (C.C.P.A.), certiorari denied, 282 U.S. 852). There is no indication that Congress did not intend this rule to apply to the Commission. On the contrary, Congress recognized that sometimes all five Commissioners would not be available; in Section 1 of the Federal Trade Commission Act (*supra*, p. 3) it

provided: "A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission." And, for 50 years the Commission has had a rule, most recently republished in 1965, which provides in its present form that "A majority of the members of the Commission constitutes a quorum for the transaction of business" (16 C.F.R. (Cum. Supp. Jan. 1, 1966) 1.7; see Annual Report of the Federal Trade Commission 1916, p. 49).[6] See, also, Reorganization Plan No. 4 of 1961 (15 U.S.C. following Section 41), which authorizes the Commission "to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner * * *." Indeed, the court of appeals below recognized the validity of the Commission's quorum rule, since it upheld the portion of the order in which the three commissioners had concurred.

Once the validity of the quorum rule is accepted, however, there is no compelling justification for requiring the quorum to act unanimously. On the contrary, as shown above, strong practical and policy considerations compel the conclusion that an agency may act by a majority of a valid quorum. "Any other method of procedure would be awkward, if not impractical" (*Frischer & Co.* v. *Elting,* 60 F. 2d 711, 714–715 (C.A. 2)). It is therefore not surprising that, except for the decision below the consistent course of judicial decision has upheld the authority of an agency to act through a majority of a quorum.

[6] This rule was upheld in *Drath* v. *Federal Trade Commission*, 239 F. 2d 452 (C.A.D.C.), certiorari denied, 353 U.S. 917.

See *Atlantic Refining, LaPeyre, Bakelite* and *Elting, supra; Gearhart & Otis, Inc.* v. *Securities and Exchange Commission*, 348 F. 2d 798, 801 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 19521

FLOTILL PRODUCTS, INC., A CORPORATION, MRS. MEYER L. LEWIS, ALBERT S. HEISER, AND ARTHUR H. HEISER, INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATION, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

[March 16, 1966]

On Petition to Review and Set Aside an Order of the Federal Trade Commission

Before: BARNES and HAMLEY, Circuit Judges; and MATHES, Senior District Judge

BARNES, Circuit Judge:

This is a petition to review and set aside an order of the Federal Trade Commission against petitioners. The Federal Trade Commission had jurisdiction to conduct the proceedings below pursuant to section 11(a) of the Clayton Act, 15 U.S.C. § 21(a). This court has jurisdiction to review the order of the Commission pursuant to section 11(c) of the Clayton Act, 15 U.S.C. § 21(c), and section 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c).

Petitioners in this proceeding are Flotill Products, Inc., which in June 1961 changed its name to Tillie Lewis Foods, Inc., and Mrs. Meyer L. Lewis, Albert S. Heiser, and Arthur H. Heiser, the owners and of-

ficers of the corporate petitioner. Flotill is a California corporation engaged in the processing, canning, and sale of certain fruit and vegetable items. Flotill also packs a line of dietetic foods which were not involved in the proceedings below. Mrs. Lewis owns 94.5% of Flotill's stock and is its president and executive officer. Albert S. Heiser owns 2.744% of Flotill's stock and is its vice president in charge of sales. Arthur H. Heiser owns 2.748% of the Flotill stock and is its vice president in charge of production. The Heisers are nephews of Mrs. Lewis.

On August 6, 1958, the FTC issued a complaint against the corporate and individual petitioners, alleging violations of sections 2(c) and (d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(c), (d). The section 2(c) charges were founded on the conduct of Flotill in:

(1) Discontinuing the payment of a 2½% commission to the brokerage firm of Bushey & Wright, sometime prior to 1955, on sales made directly to the Nash-Finch Company, a large midwestern wholesale grocer, and the subsequent payment to Nash-Finch of a 2½% allowance for advertising and promotion which the FTC counsel contended were really payments "in lieu of brokerage" proscribed by section 2(c); and

(2) the payment by Flotill and Nash-Finch of ½% each to Bushey & Wright for work in arranging "pool car" shipments from Flotill to Nash-Finch of less than car-load lots which was instituted after Flotill had stopped paying Bushey & Wright the 2½% commission on its direct sales to Nash-Finch.

The section 2(d) charges were based on the discriminatory payment by Flotill of promotional allowances in 1956–1957 to Elm Farm Foods Company and Stop & Shop, Inc., retail grocers in the Boston,

Massachusetts area, while not paying such promotional allowances to First National Stores, Great Atlantic & Pacific Tea Company, Star Market Company, and Supreme Markets, Inc., who were in competition with the "favored" customers in the Boston area.

Proceedings before a hearing examiner of the FTC began on July 7, 1959, but were delayed while the petitioners' refusal to comply with a subpoena duces tecum was being litigated. 6 F.T.C. Statutes and Court Decisions 665 (1959), *Flotill Products, Inc.* v. *F.T.C.*, 278 F. 2d 850 (9th Cir.), *cert. denied*, 364 U.S. 920 (1960). At the conclusion of resumed hearings, the hearing examiner issued his opinion on March 25, 1963, in which he sustained the section 2(d) charge and that portion of the 2(c) charge relating to discounts "in lieu of brokerage" to Nash-Finch, but found that petitioners' dealing with field brokers did not violate section 2(c) and that the persons named as respondents in the complaint should not be held in their individual capacities for the violations found to exist. Cross-appeals were taken from the hearing examiner's decision to the Commission, which issued its decision on June 26, 1964, upholding the hearing examiner's determination as to the 2(c) and 2(d) violations, but reversing his determination that the order to be entered should not apply to the individual petitioners as well as to the corporation.

Procedural questions arise as a result of the hearing before the Commission, in that the full Commission consists of five members but only three participated in the decision because there was one vacancy and one commissioner did not hear the oral arguments and did not join in the decision. The opinion for the Commission was written by Chairman Dixon; Commissioner MacIntyre wrote a separate opinion concurring with Dixon with the exception of the dismissal

of the charge concerning dealings with "field brokers"; and Commissioner Elman filed a separate opinion in which he *concurred* in the result as to the 2(d) charge and the inclusion in the order of the corporate officers in their individual capacities, *agreed* with the result but differed on the reasoning as to the dismissal of the 2(c) charge insofar as it pertained to "field brokers" transactions, and *dissented* from the holding that the allowances which Flotill gave to Nash-Finch were "in lieu of brokerage and therefore violated section 2(c)."

Following the issuance of the Commission decision, petitioners here filed a petition for reconsideration before the Commission. Reconsideration was denied in an order issued September 3, 1964, in which the grounds for reconsideration were answered by the Commission. This petition to review and set aside the final order of the Commission followed.

I—*Alleged Procedural Defects*

Petitioners contend that the Commission's order must be set aside as to both the section 2(c) and 2(d) orders because at least three members of a five member commission must affirmatively vote for an order, and must vote for it on the same grounds, in order for it to become a valid order of the commission. Petitioners argue that this requirement was not met as to the section 2(c) order because only Commissioners Dixon and MacIntyre agreed to it and Commissioner Elman dissented, and was not met as to the section 2(d) order because Commissioner Elman's concurrence does not indicate that it was on the same grounds or relied on the same evidence as that relied upon by Dixon and MacIntyre.

First, as to the section 2(c) decision in which only two Commissioners agreed. We have examined the

authority and arguments put forth by both parties and find ourselves in agreement with petitioners that, absent statutory authority or instruction to the contrary, three members of a five member commission must concur in order to enter a binding order on behalf of the commission. (Tr. 119) This was not done in the case of the 2(c) order here in dispute.

Respondent places primary reliance on the case of *Atlantic Refining Company* v. *F.T.C.*, 344 F. 2d 599 (6th Cir. 1965). We agree that the language used by the court in that case is authority for respondent's position, but find ourselves unconvinced by the "succinct" disposal of the issue in that case. The court's entire treatment of the point here in dispute is contained in this statement:

> As to other issues presented by petitioner, we can be more succinct. The rules of the Federal Trade Commission since its inception have provided for decision by the majority of panels of three members. We believe this rule is within the Commissioner's power to make and is wholly valid. *Drath* v. *Federal Trade Commission*, 99 U.S. App. D.C. 289, 239 F. 2d 452 (1956), cert. denied 353 U.S. 917, 77 S. Ct. 666, 1 L. ed. 2d 664 (1957). (344 F. 2d at 607.)

Petitioners correctly point out that the court in *Atlantic Refining* both misconstrued the FTC rule [1] and relied upon a case, *Drath, supra,* which is not shown to be in point. In the *Drath* case the court expressed its approval of the Commission rule that "A majority of the members of the commission shall constitute a quorum for the transaction of business." It does not appear that the order which resulted from a three man panel hearing the cause was concurred in by less than

[1] That rule states: "A majority of the members of the Commission constitutes a quorum for the transaction of business." 16 C.F.R. 1.7.

three, which would be a majority of the Commission. This did not raise the issue here in dispute. Since the statement from *Atlantic Refining* states a bare conclusion, and makes no attempt to support its position in reason, we are unenlightened as to why the court thought the "majority of the quorum" rule applicable or desirable.

We readily agree respondent's position is also supported by *Frischer & Co.* v. *Bakelite Corporation,* 39 F. 2d 247 (C.C.P.A.), *cert. denied* 282 U.S. 852 (1930), wherein the Court of Customs and Patent Appeals stated that "the trend of modern authority is that in collective bodies other than courts, even though they may exercise judicial authority, a majority of a quorum is sufficient to perform the functions of the body." (39 F. 2d at 255.) But the court then proceeds to support its statement with a series of state decisions dealing with town meetings and city councils, which frankly strike us as inapposite when we seek to determine the rule which is to govern decisions of a statutorily created administrative tribunal like the Federal Trade Commission.

Respondent has previously used this case, and the *Drath* case, *supra,* to support the authority of a two-man majority of a three-man quorum. *Borden Co.,* F.T.C. Docket No. 7474, April 10, 1964 (15 Pike and Fischer Administrative Law (2d) 344–5).

Respondent seeks also to support its position by reference to section 1 of the Federal Trade Commission Act, 15 U.S.C. § 41, and to a rule of the FTC, 16 C.F.R. § 1.7. We do not consider this authority determinative. The pertinent provision in section 1 of the FTC Act (last sentence of first paragraph) states "A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all

the powers of the commission."[2] This provision only has the effect of authorizing action by less than the full commission; it does not provide that less than a majority of the full commission may enter a final order, for in the event of a single vacancy a majority of the remaining commissioners is still three. The FTC rule, referred to earlier in the *Atlantic Refining* case, *supra,* provides that "A majority of the members of the Commission constitutes a quorum for the transaction of business." We could, perhaps, agree that the reasonable construction of such a rule would be that a majority of the quorum would be sufficient to render a decision, but do not find that argument dispositive in the absence of a clear showing that the FTC regulation is within the power of the FTC to adopt, tested in the light of the extent of the power conferred upon the FTC by Congress. Respondent stresses the fact that such a rule has been in effect for forty years. We cannot believe that a long adherence to an improper rule (if indeed it is improper) gives the Commission any vested right to continue such adherence. As petitioners accurately point out, when Congress wanted to authorize the exercise of the powers of an administrative body by less than the full body in other situations, it did not lack the words to do so expressly. Cf. National Labor Relations Board, 29 U.S.C. § 153(b); Interstate Commerce Commission, 49 U.S.C. § 17(1).

We do not desire to overstate our agreement with petitioners in this matter, and therefore we have stated that respondent's position is not without support. As already noted, the *Atlantic Refining* and *Frischer* cases, *supra,* directly support that position,

[2] We note the reference in the Act is singular and not plural. Suppose there were plural vacancies? Would respondent contend that if there were four vacancies one member could act?

and *Drath, supra,* may be said to do so inferentially. It might also be argued, although respondent has not done so, that the express permission of Congress to the NLRB and the ICC to delegate its authority to panels, and congressional acquiescence in the FTC quorum rule for a long period reflects congressional approval of such a policy of expediting the work of administrative bodies. On the other hand, both of the bodies to whom such permission was expressly granted are larger than the FTC and it is difficult to believe that Congress conceived of the five member FTC with its politically balanced make-up, permitting two of its members to speak for the Commission.

Respondent puts forth an additional argument, which we believe merits consideration: that "the necessity of administrative agencies fashioning their own procedural rules as well as their authority to do so has long been recognized by the courts. See *Federal Communications Commission* v. *Schreiber,* — U.S. —, 85 Sup. Ct. 1459, 1467 (1965), and cases cited therein." While we agree with the general proposition stated by respondents, we are not assured that it controls the point in dispute here. The *Schreiber* case, for example, dealt with the interpretation of section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(j). That legislative action expressly granted to the FCC a measure of autonomy in determining its own procedures. Not only is such a specific grant of power lacking in the Federal Trade Commission Act, but the type of "procedural rules" referred to in *Schreiber* were not of the same nature as the quorum requirement here in dispute. The *Schreiber* case, and a number of cases cited therein, particularly *Wallace Corporation* v. *N.L.R.B.,* 323 U.S. 248 (1944), *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501 (1943), and *F.C.C.* v. *Pottsville Broad-*

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casting Co., 309 U.S. 134 (1940), do, as respondent states, refer to the broad powers of administrative bodies in determining their own procedural rules. But in each of these cases the power of the administrative body to do so is premised on its expertise in dealing with one particular specific industry which it was designed to regulate. We do not quarrel with the propriety of administratively determined procedures in such cases, but do not believe that that same principle is applicable in this case *where the problem relates to the interpretation of the FTC's enabling legislation.* We do not think it proper for this court to amend the Federal Trade Commission Act nor to permit it to be amended by a Commission rule, in the absence of a stronger showing of congressional intent than has been made here, and in the presence of express provisions in the enabling legislation creating other agencies (such as the NLRB and ICC) to accomplish the result sought.

In light of the Commission's adherence to its "majority of a quorum" rule for such an extended period, we do not believe that the proper remedy would be to simply set aside or deny enforcement of its section 2(c) order. Rather, we remand the section 2(c) violation to the Commission for further hearings to determine whether a majority of the Commission desire to enter such an order. We express no doubt as to the validity of the Commission's practice of conducting hearings before less than the full membership. We say only that an order of the Commission must be supported by three members in order to constitute an enforceable order of the FTC. Two of five is too few.

For the above reasons, we will remand, and await a further determination by the FTC before considering

the facts and law relating to the alleged section 2(c) violations.

Petitioners assert that the order regarding the section 2(d) violation should also be denied enforcement because Commissioner Elman concurred in the result, but did not enumerate the grounds for his concurrence, nor the conclusions or findings upon which he based his concurrence, and that consequently "the Commission has provided no 'statement of * * * findings and conclusions' nor 'reasons or basis therefor' as required by Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b)." We cannot agree. We approve the reasoning of the three judge district court in *Chicago, B. & Q. R. Co., United States,* 60 F. Supp. 580 (E.D. Ky. 1945) where the court was faced with a similar contention in reviewing a freight rate order of the ICC. While petitioner argues that no grounds to support his concurrrence can be taken from Commissioner Elman's simple statement following his section 2(c) dissent that "With respect to the other issues in the present case, I concur in the result" (Record, p. 114, n. 13), we believe it more reasonable to assume that his statement constituted a substantial adoption of Chairman Dixon's opinion for the Commission as to the 2(d) violations. As stated by the court in *Chicago, B. & Q. R. Co., supra,* "We interpret the statement by the fifth Commissioner that he 'concurs in the result' of both reports filed in this case to mean that, while he does not assent to all the comments or observations made therein, he is, nevertheless, sufficiently in accord with the rationale of them to enable him to agree * * *." 60 F. Supp. at 583.

II—*Promotional Allowances*

All three Commissioners who participated in the Flotill proceedings agreed that Flotill had violated section 2(d) in two particulars. First, by not making available to Stop & Shop in 1956 and 1957 the same promotional allowance which it made to Elm Farm Foods, a competitor of Stop & Shop in the Boston area, and second, by not making available any similar promotional allowance to customers who competed in the Boston area but who made their purchases in the "California Street" market and shipped the goods to Boston rather than buying through brokers in Boston as Elm Farm Foods and Stop & Shop did.

Petitioners attack the first section 2(d) charge by asserting that Stop & Shop, which did not receive the allowance in 1957, had received such an allowance in 1956 and did not consider the availability of a promotional allowance from Flotill in determining whether to promote Flotill items, and that Flotill was not obligated to make a futile gesture by paying a promotional allowance where there was no consideration and when the payment of such allowance did not result in the increased promotion of its products.

Petitioners attack the findings supporting the second 2(d) violation by asserting (a) that it had no obligation to pay equivalent allowances for promotion in a local area to customers who choose to purchase in different markets thousands of miles apart; (b) that it had no way of knowing the ultimate destination of the goods purchased in the California Street market and hence is not chargeable with knowledge that the goods would be sold in competition with those sold by Flotill to Elm Farm Foods and Stop & Shop; (c) that in any event the allegedly "disfavored" purchasers were not "direct customers" of Flotill in Boston and thus Flotill was under no obligation to pay them a

promotional allowance equivalent to the one paid all customers buying through its Boston broker to promote Flotill products in Boston; (d) that the Commission erred in including Food Center Wholesale Grocers, Inc., in the coverage of the cease and desist order in reliance on the Commission's holding in *Fred Meyer,* Dkt. No. 7492 (March 29, 1963),[3] without reversing the hearing examiner's decision excluding Food Center Wholesale Grocers, Inc. from consideration as a "disfavored" competing customer, and finally (e) that Commission counsel failed to sustain the burden of proving that customers who did not receive the promotional allowance were in competition with customers who did receive such allowances.

First, as to the discrimination between Elm Farm Foods and Stop & Shop in 1956 and 1957, we find substantial evidence on the record as a whole that an offer of a promotional allowance to Stop & Shop would not have been a "futile gesture," as petitioners contend, and that petitioners have not complied with and in fact have misconstrued the provision in the Federal Trade Commission Guide for Allowances and Service, 1 Trade Reg. Rep. § 3980, that a seller make a specific offer of a promotional allowance to meet the "availability" standard of section 2(d).[4] Accordingly, we

[3] That order held that the Commission considers wholesalers whose customers compete with direct buying retailers to be in competition in the distribution of goods with the direct buying retailers.

[4] Section 2(d), 15 U.S.C. § 13(d):

"(d) *Payment for services or facilities for processing or sale.* It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any

believe that this portion of the 2(d) order is entitled to enforcement.

Second, the Commission's findings that Flotill knew or should have known that the goods sold to the four "disfavored" customers were intended for sale by the purchasers in the Boston area is supported by substantial evidence. The record shows that though these sales were negotiated in San Francisco, *all were billed and shipped by Flotill to the retailers in the Boston area,* and the testimony of Albert S. Heiser indicates that Flotill knew that it was making sales to the "disfavored" four in the Boston area. Furthermore, we agree with Chairman Dixon's contention that petitioners were under an obligation to determine whether customers in fact compete, and that "If it were otherwise, sellers could avoid their obligations under the statute simply by closing their eyes to the obvious." (R. 89.) Nor can we agree with petitioners' contention that Commission counsel failed to sustain the burden of proving that customers who did not receive the promotional allowance were in competition with customers who did. While we tend to believe that the hearing examiner's determination that "The competitive retail grocery market represented by the Boston area, as used herein, may be loosely defined to include an area within a radius of approximately 25 to 50 miles of the center of Boston," was a little too "loose" to be of much value, the record contains substantial evidence regarding the number and location of the retailers involved, and credible testimony from the grocery buyers of the firms involved, to establish that the six firms were in

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products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

competition with one another in the Boston area. Further, in defining the requirements of the competitive market definition which must be made to show a violation of section 2(d), we adhere to the statement of Judge Hamley in *Tri-Valley Packing Association* v. *F.T.C.*, 329 F. 2d 694, 708 (9th Cir. 1964) that "In our opinion, where a direct customer of a seller, operating solely on a particular function level such as wholesaling or retailing, receives a promotional allowance not made available to another direct customer operating solely on the same functional level, it is unnecessary to trace the seller's goods of like grade and quality to the shelves of competing outlets of the two in order to establish competition."

We find the treatment of Food Center Wholesale Grocers, Inc., more troubling. After pointing out that the hearing examiner dismissed the charge that Food Center Wholesale should also be viewed as a "disfavored customer," Chairman Dixon went on to state:

> As a practical matter we see no real need to resolve the factual and legal questions here presented. The Fred Meyer decision places these respondents, no less than any other interstate sellers, on notice that the Commission considers wholesalers whose customers compete with direct buying retailers to be in competition in the distribution of goods with the direct buying retailers. Thus, to comply with the order to cease and desist to be entered herein, the respondents must henceforth consider Food Center and all similarly situated wholesaler customers as customers within the scope and meaning of Section 2(d). Since we have not reviewed the hearing examiner's findings and conclusions on this point (Finding 105 through 110), they will not be adopted as part of the Commission's decision. (R. 92–93.)

We note that the *Fred Meyer* decision is now before this court for review (*Fred Meyer, Inc.* v. *F.T.C.*, No. 18,903), that petitioners contend that earlier decisions of this court hold squarely against the Commission's decision in *Fred Meyer* (Cf. *Tri-Valley Packing Association* v. *F.T.C., supra,* pp. 709–10; *Alhambra Motor Parts* v. *F.T.C.*, 309 F. 2d 213 (9th Cir. 1962)), and that the Commission did not even review the findings regarding Food Center. In light of these facts we consider it improper to include Food Center and other wholesale customers within the scope of the cease and desist order, for, though Chairman Dixon is correct in stating that petitioners have the same notice of the Commission's position as all other sellers as a result of the *Fred Meyer* decision, not all other sellers are subject to contempt proceedings for violation of that order as Flotill would be if Food Center and other wholesalers were included in the cease and desist order without the hearing examiner's findings on the point even having been reviewed. Although the remedial order is broadly framed and does not make reference to specific customers, we think it best to make clear that on the record in this case, the prohibition shall not be understood to extend to Food Center and other wholesalers.

III—*Scope of the Order*

Petitioners direct two attacks against the drafting of the final order of the Commission. First, that it must be limited to the corporation and not extend to the named officers of the corporation, and second, that the order must be limited in scope and definitive in its terms.

In regard to the first ground of attack on the order, we note that the hearing examiner dismissed the complaint as to the Flotill executives in their individ-

ual capacities, finding that the corporate organization was stable and not a sham, and that "There is no showing and no suggestion of any special circumstances which would indicate a likelihood that the individual respondents would cause an evasion of any order which may be entered herein against the corporation." (R. 19.) In framing the order to include the individual petitioners, Chairman Dixon relied on no other fact than that the three individuals owned and controlled the corporation. He concluded: "Under such circumstances, when the corporation is merely the alter ego of individuals, we have generally felt that an order against the individuals is necessary." (R. 95.)

We find that the Commission has abused the discretion granted it in framing the order to include the individual petitioners. The rather cavalier use of the "alter ego" doctrine finds no support in the record, and the order points to no evidence to challenge the findings of the hearing examiner that the corporate entity has ever been used in such a way as to justify treating it as the "alter ego" of its owners. We agree with petitioners that naming them individually in the order is tantamount to a finding on the evidence that they have personally violated, or can be expected to violate, the Clayton Act. We have not been shown the evidence in the record, if any there be, which supports such a conclusion. Accordingly, the Commission order to be enforced should not refer to the petitioners in their individual capacities. Authority for such deletion is to be found in *Coro, Inc.* v. *F.T.C.*, 338 F. 2d 149 (1st Cir. 1964) and *Rayex Corp.* v. *F.T.C.*, 317 F. 2d 290 (2d Cir. 1963).

Petitioners' attack on the scope and particularity of the balance of the final order is largely without merit. A great deal of discretion has been vested in the FTC

as to how best to remedy industry abuses, and the Commission is not limited to prohibiting merely the precise acts which have already occurred. *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608 (1946); *F.T.C.* v. *Henry Broch & Co.*, 368 U.S. 360 (1962). Accordingly, the rest of the language of the order is held proper.

Enforcement of the order of the Federal Trade Commission is ordered to the extent that the order relates to the section 2(d) violations, with the reference to petitioners in their individual capacities deleted. Enforcement of the order as it relates to the section 2(c) violations is denied. The matter is remanded to the FTC for further proceedings to determine whether a majority of the Commission join in the section 2(c) findings.

HAMLEY, Circuit Judge (Dissenting in Part):

I dissent from that part of the majority opinion which holds that at least three members of respondent Commission must affirmatively vote for an order, and since this requirement was not met with regard to the section 2(c) violation, that part of the proceedings must be remanded.

I think it is too late in the day to raise this question. The Commission rule (16 C.F.R. 1.7) providing that a majority of the members of the Commission constitutes a quorum for the transaction of business, has been in effect for forty years. The reasonable construction of that rule is that a majority of the quorum would be sufficient to render a decision. It has been so construed by the Commission for a very long time. Congress has not seen fit to negate that construction by enacting legislation expressly prohibiting the Commission from acting through a majority of a three-member quorum.

I concur in the remainder of the majority opinion.

APPENDIX B

United States Court of Appeals for the Ninth Circuit.

No. 19521

FLOTILL PRODUCTS, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Filed August 15, 1966

On Petition to Review and Set Aside an Order of the Federal Trade Commission

ORDER

Before: CHAMBERS, BARNES, HAMLEY, JERTBERG, MERRILL, KOELSCH, BROWNING, DUNIWAY and ELY, Circuit Judges

Per curiam:

The court en banc takes the case solely for the purpose of deciding "When is a majority a majority?".

The opinion of Judge Barnes is amended as follows: To the second paragraph on page 229 of 358 F. 2d, after 49 U.S.C. § 17(1), is added: "Federal Power Commission, 16 U.S.C. § 792." In the third paragraph on page 229, the last sentence there of is striken, and substituted therefor is the following: "On the other hand, it is difficult to believe that Congress conceived of the five-member FTC with its politically balanced make-up, permitting two of its members to speak for the Commission, and failed to specifically provide enabling legislation."

Judges Chambers, Jertberg, Koelsch and Duniway concur in the opinion of Judge Barnes as so modified.

Judges Merrill, Browning and Ely concur with Judge Hamley in his dissent.

APPENDIX C

The United States Court of Appeals for the Ninth Circuit

No. 19521

FLOTILL PRODUCTS, INC., A CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Filed April 1, 1966

FINAL DECREE

Petitioners herein having filed in this Court on September 10, 1964, a petition to review and set aside an order to cease and desist issued against them on June 26, 1964, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Flotill Products, Inc., a corporation, Mrs. Meyer L. Lewis, Albert S. Heiser, and Arthur H. Heiser, individually and as officers of said corporation, Docket No. 7226," and the matter having been heard by this Court on the record and briefs on October 13, 1965, and this Court having rendered its decision on March 16, 1966;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist be, and it hereby is, modified to read as follows:

> IT IS ORDERED that respondent Tillie Lewis Foods, Inc. (formerly Flotill Products, Inc.), a corporation, its officers, agents, representatives

and employees, directly or indirectly, through any corporate or other device, in or in connection with the sale of canned fruits and vegetables in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products with the favored customer.

IT IS FURTHER ORDERED that respondent, Tillie Lewis (formerly Flotill Products, Inc.) shall, within 60 days after entry of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist set forth herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that enforcement is denied of the Commission's Section 2(c) order and that that matter is remanded to the Federal Trade Commission for further hearings to determine whether a majority of the Commission desires to enter such an order.

STANLEY N. BARNES,
FREDERICK G. HAMLEY,
WM. C. MATHES,
United States Circuit Judges.

Dated: March 31, 1966.

APPENDIX D

United States Court of Appeals for the Ninth Circuit

No. 19521

FLOTILL PRODUCTS, INC., ET AL.
v.
FEDERAL TRADE COMMISSION

Filed June 20, 1966

ORDER FOR REHEARING EN BANC

Circuit Judges Stanley N. Barnes and Frederick G. Hamley have filed a request that the above case be reheard en banc.

Accordingly, it is ordered that the case will be reheard en banc.

The clerk in due course will notify the parties of the date of rehearing.

/s/ RICHARD H. CHAMBERS
/s/ STANLEY N. BARNES
/s/ FREDERICK G. HAMLEY
/s/ GILBERT H. JERTBERG
/s/ CHARLES M. MERRILL
/s/ JAMES R. BROWNING
/s/ M. OLIVER KOELSCH
/s/ BEN. C. DUNIWAY
/s/ WALTER ELY
United States Circuit Judges.

APPENDIX E

FEDERAL TRADE COMMISSION DOCKET 7887

In the United States Court of Appeals for the Fifth Circuit

No. 21787

EMILE M. LAPEYRE, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Trade Commission (Louisiana Case)

(September 13, 1966.)

Before JONES and GEWIN, Circuit Judges, and HUNTER, District Judge

HUNTER, District Judge: Section 5(a)(6) of the Federal Trade Commission Act empowers and directs the Commission "to prevent persons, partnerships or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."[1] Proceeding under this au-

[1] Pertinent provisions of the Act are:

"Section 5(a)(1). Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are declared unlawful. * * *

"(6) The Commission is hereby empowered and directed to prevent persons, partnerships or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. 66 Stat. 632 as amended, 15 U.S.C., § 45 (a)(1)(6) (1964)."

thority the Commission filed a complaint against Peelers Corporation, Grand Caillou Packing Company, and members of the LaPeyre family. Through Peelers, the family, by virtue of holding certain patents, enjoys a monopoly of the manufacture and distribution of shrimp processing machinery used in shrimp canning. Through Grand Caillou, the family is engaged in the shrimp canning business on the Gulf Coast. The complaint was issued on May 13, 1960 and charged in substance that petitioners' practices in leasing and selling shrimp processing machines have the tendency to unduly hinder competition and have injured competition in the sale of shrimp and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5.

Following the conclusion of all hearings, the Examiner, on April 25, 1963, issued his initial decision in which he found Peelers had charged discriminate and substantially higher rental rates to canners located in the States of Oregon, Washington and Alaska than to competing canners located in other states of the United States, thereby violating Section 5 of the Act. He accordingly included in his initial decision an order directing petitioners to cease and desist from discriminating between lessees in the rental charge for their shrimp processing machines. All other allegations of the complaint were dismissed, as was the complaint in its entirety against Grand Caillou. Cross-appeals were taken to the Commission. The Commission, with Commissioner Elman concurring in part and dissenting in part, issued its decision in which it set aside and vacated the initial decision. The Commission made its own findings as detailed in *Grand Caillou Packing Company,* No. 7887 —. F.T.C. June 4, 1964, and concluded that petitioners had violated Sec-

tion 5 by charging shrimp canners in the Northwest a substantially higher rental rate than that charged to canners on the Gulf Coast, *and* by selling shrimp processing machines to foreign shrimp processors, while refusing to sell them to domestic canners who competed with or were potential competitors of the foreign shrimp processors.[2] We have before us the petition to review these conclusions and to set aside the cease and desist order.

The records show the following facts relevant to our decision. Prior to the availability of petitioners' shrimp peeling machinery in 1949, the domestic canners, who were then all located in the Southern part of the United States, utilized hand labor for peeling shrimp. Hand peeling, of course, had many disadvantages, not the least of which was the number of handpickers required to produce a given quantity of peeled shrimp. By 1949 petitioners had perfected their machinery and subsequently offered it to the canning industry. In view of the limited demand, Peelers decided that it would be more profitable to lease than sell the machines to domestic shrimp canners. In order to establish a price which would induce shrimp canners to use their machines in lieu of hand labor, petitioners had a study prepared which compared the cost of hand peeling with that of machine peeling. Utilizing this study, and drawing upon their own knowledge of the industry, they set a lease fee or rate of fifty-five (55¢) cents for each 100 cycles

[2] Commissioner Elman, in a separate opinion, concurred in the conclusion that petitioners were in violation of Section 5 in charging Northwest canners higher rental rates than Gulf Coast canners, but he differed with the majority on the reason for this conclusion. He dissented from the Commission's holding that petitioners' practice of selling its shrimp processing machines to foreign shrimp processors but not to domestic shrimp processors constituted a violation of Section 5.

of the machine's roller. The machines represented such a tremendous advantage and improvement over the hand peeling that eventually all Gulf Coast canners became lessees. The installation of the machines so dramatically lowered the peeling cost that to Gulf Coast canners it became necessary to have their use in order to stay in the shrimp canning business. The decisive advantage over hand peeling was attributable mainly to the machines' capability of peeling smaller shrimp. In using petitioners' machines, it cost no more to peel the tiny shrimp than it did to peel the larger sizes.

In the latter part of 1953, James M. LaPeyre traveled to the West Coast and visited several individuals connected with the fishing industry for the purpose of determining the potential for petitioners' machines in that area. While no final conclusions were reached as a result of the trip, some individuals expressed a definite interest in leasing petitioners' machines. Thereafter, petitioners obtained samples of raw pandalid shrimp,[3] a species different from the shrimp caught in the Gulf of Mexico. These samples were tested on the

[3] The canners in the Pacific Northwest obtain their raw shrimp from the waters off the coasts of Oregon, Washington, and Alaska. The shrimp found in these waters are cold water shrimp of the pandalid type. In contrast to the penaeid shrimp found in the Gulf of Mexico, the pandalid shrimp are much smaller, running at average counts of more than ninety to the pound of raw heads-on shrimp. As a result of the small size of the raw shrimp, the Northwest canners produce principally only the "tiny" grade of shrimp. Also, in contrast to the Gulf Coast penaeid shrimp, the cold water pandalid shrimp contain less meat per shrimp, since the tail part, from which the meat is obtained, constitutes a smaller proportion of the entire shrimp. In the penaeid shrimp the tail represents approximately 60 per cent of the total weight of the shrimp, while in the pandalid shrimp, the tail accounts for only about 40 percent.

machines, and it was found that with minor modifications the equipment could satisfactorily peel the pandalid shrimp. The first lease in the Northwest was in the Fall of 1956 to Edward Kaakinen. The rental rate was fixed at $1.10 per unit increase (100 cycles of the roller), or exactly twice the rate of 55 per unit increase which was being charged the Gulf Coast canners. When petitioners subsequently leased their machines to other shrimp canners in the Northwest, they adhered to this practice of charging twice the rental rate paid by the Gulf Coast canners. They justify the difference on the basis that it was set in order to adhere to petitioner's policy of charging a rate in proportion to labor saved. Stated succinctly, the explanation of the differential is that this charge was warranted, because the shrimp processed by the Northwest canners require—because of smaller size—about twice as much hand labor per pound to process as the larger shrimp processed in the Gulf Coast canneries, and petitioner's machinery is a substitute for hand labor.[4]

Foreign interest in the peeling machines became evident. Accordingly, in order to protect their patent rights abroad, petitioners either obtained patents or else have applications pending on their peeling machinery and shrimp deveiners in some 42 foreign countries where the availability of shrimp indicates a potential demand. In October of 1956 the machines were offered abroad on a lease basis only. In February of 1958 petitioners changed their policy of

[4] The record is undisputed that (1) the peeling machines replaced hand labor; (2) that the smaller shrimp of the Northwest ran on the average at least twice as many to a pound of raw-heads-on shrimp as in the Gulf; and (3) it took the same amount of hand labor to peel a shrimp regardless of size.

only leasing their machines abroad and instead decided to sell them in all foreign countries except Mexico and Canada where the machines were still offered on a lease basis. As of January 1, 1962, the machines, with one exception, were all offered for sale abroad and petitioners sold twenty peeling machines, seventeen separators, and sixteen cleaners to customers in eleven foreign countries.

Under the circumstances of this case, is it a violation of Section 5 of the Act for Peelers to charge the Northwest canners twice as much as the Gulf Coast canners for rental of identical machines? The source of the discriminatory effects and of the consequent injury to the Northwest canners is not inequality of bargaining power among customers. It is, rather, the conjunction of two factors: the cost differential in the processing of shrimp by hand as between the Northwest canners and the Gulf Coast canners; and Peelers' monopoly of shrimp processing machinery, which enables the differential in shrimp processing costs to be maintained notwithstanding the substitution of machinery for hand labor. If petitioner did not have a monopoly of shrimp processing machinery, presumably competition would drive the price of such machinery to the Northwest canners down toward the level of the Gulf Coast canners, since the cost of processing shrimp by machine is the same regardless of the size of the shrimp. Conceptually, then, the problem of this case is not one of Robinson-Patman-type discrimination, but of the duty of a lawful monopolist to conduct its business in such a way as to avoid inflicting competitive injury on a class of customers. The Commission found the price differential to be discriminatory, ascertained the requisite adverse effect on commerce, rejected Peelers' claim of justification, and consequently issued a cease and desist order. The

majority found that petitioners were attempting to protect their own interests as shrimp canners (Grand Caillou) from the competition of the Northwest canners. Commissioner Elman did not agree on the question of motive. His rationale was that the petitioners were simply attempting to maximize their profits, and that they were charging what the traffic would bear with, as it happens, discriminatory results. We need not resolve these contrary findings as to motive.

Both the majority and Commissioner Elman found that the central characteristic was the same—the utilization of monopoly power in one market resulting in discrimination and the curtailment of competition in another. The Commission's approach is consistent with the broad scope of a Section 5 proceeding. The words "unfair practices" and "unfair methods of competition" are not limited to precise practices that can readily be catalogued. They take their meaning from each case and the impact of particular practices on competition and monopoly. Without further belaboring the issue, it suffices to say that there is abundant evidence in the record to support the Commission's conclusion that Peelers' leasing procedure is innately discriminatory and anti-competitive in its effect, and that in circumstances of the instant case, the refusal to treat the Northwest and the Gulf Coast shrimp canners on equal terms has substantially and unjustifiably injured competition in the shrimp canning industry. It is therefore an unfair method of competition forbidden by Section 5.[5]

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[5] *Federal Trade Commission* v. *Brown Shoe Company, Inc.*, — U.S. —, decided June 6, 1966; *Atlantic Refining Company* v. *Federal Trade Commission* (1965) 381 U.S. 357, 85 S. Ct. 556; *Pan American World Airways* v. *United States* (1963) 371 U.S. 296, 307, 83 S. Ct. 9 L. Ed. 2d 325. See also *Federal Trade*

We now turn to the matter of relief in this regard. The Commission ordered petitioners to cease and desist from:

> (1) Discriminating between lessees of such machinery by charging higher rental or use rates to any lessee than are charged to any other lessee.
>
> For the purposes of this proceeding; lease or rental terms which result in any lessee paying a higher rate than the rate charged any other lessee for use of respondents' machines for the same period of time or through the same number of mechanical revolutions or operations shall be deemed discriminatory.

The argument is made that the Order is arbitrary, goes too far, and disallows any method of charging other than a rental on the basis of machine use. Congress has placed in the Commission in the first instance the power to shape the remedy necessary to deal with the situation presented. We will interfere only where there is no reasonable relation between the remedy and the violation. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). On this record we cannot say that the Commission's remedy is unreasonable, when it is considered that petitioners ask for the right to charge by the number of shrimp or some variation of this method which would result in the same discrimination.

A reading of the record and briefs convinces us that the Commission erred in its finding that peti-

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Commission v. *Motion Picture Advertising Service Co., Inc.* (1953) 344 U.S. 392, 73 S. Ct. 361, 97 L. Ed. 426; *United States* v. *Paramount Pictures* (1948) 334 U.S. 131, 68 S. Ct. 915; *Federal Trade Commission* v. *Cement Institute* (1948) 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010; *Fashion Guild* v. *Federal Trade Commission* (1941) 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949; *Federal Trade Commission* v. *Beech-Nut Co.* (1922) 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307.

tioners violated Section 5 in selling shrimp processing machines to foreign canners while maintaining a policy of leasing to domestic canners. The evidence does not reveal in any manner unlawful purpose. Efforts were made to lease the machines abroad consistent with the domestic leasing policy. However, such leasing was found to be impractical due to exchange problems, import licenses, and the difficulties of servicing machines in foreign countries. Consequently, petitioners found that in order to utilize their foreign patents and develop potential markets, they would have to sell the machines abroad. The record as a whole does not contain substantial evidence that the ability of foreign canners to purchase the equipment constitutes an advantage, much less an advantage of considerable proportions, as suggested by the Commission. We agree with Commissioner Elman that "the record tells us altogether too little about the cost of foreign shrimp canners to justify an inference of competitive injury." We find that there is no substantial evidence to support the Commission's finding that the probable effect of selling shrimp processing machines abroad will be to injure and seriously curtail the competitive abilities of the domestic shrimp canners in either the export or domestic market.

Another question raised by the petition for review is whether the Commission can issue a valid order to cease and desist without the concurrence of a majority of its authorized membership. Three Commissioners participated in this decision. There was one vacancy. Another Commissioner abstained because he had not been appointed until after oral argument. Of the three participating Commissioners, two joined in the opinion and order, and Commissioner Elman filed a separate opinion in which he concurred in the

findings that petitioners' leasing practices were "an unfair method of competition forbidden by Section 5," but dissented from the finding that petitioners injured the competitive opportunities of domestic canners by selling their patented shrimp machinery to foreign shrimp canners. The rules of the Federal Trade Commission provide for decision by the majority of panels of three members.[6] We believe this rule is within the Commission's power to make and is wholly valid. *Drath* v. *Federal Trade Commission,* 99 U.S. App. D.C. 289, 239 F. 2d 452 (1956), cert. denied 353 U.S. 917; *Atlantic Refining Company* v. *F.T.C.,* 6th Cir. 1965, 344 F. 2d 599, cert. denied 382 U.S. 939.[7] Moreover, Paragraph 1 of the order is clearly valid, Commissioner Elman having concurred therein.

CONCLUSION

The first numbered paragraph of the Commission's cease and desist order is affirmed and will be enforced.[8]

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[6] "A majority of the members of the Commission constitutes a quorum for the transaction of business." 16 C.F.R. 1.7.

[7] The Court of Appeals for the Ninth Circuit, in *Flotill Products, Inc.* v. *F.T.C.,* 358 F. 2d 224, where the question was decided adversely to the contention of the Commission, did, on June 20, 1966, grant a rehearing en banc on this precise question. On August 15, 1966 the 9th Circuit, in a 5–4 decision, affirmed the panel decision.

[8] Paragraph 1 orders petitioners to cease and desist from:

"(1) Discriminating between lessees of such machinery by charging higher rental or use rates to any lessee than are charged to any other lessee.

"For the purposes of this proceeding, lease or rental terms which result in any lessee paying a higher rate than the rate charged any other lessee for use of respondents' machines for the same period of time or through the same number of mechanical revolutions or operations, shall be deemed discriminatory."

Since we have found that the record fails to support the Commission's finding of a probable adverse effect upon competition by reason of petitioner's sales of shrimp processing machines to foreign canners, we set aside paragraph two (2)[9] of the cease and desist order. We are reluctant to set aside this portion of the order without a remand, but there is no indication that any additional evidence is available, and no motion has been made under 15 U.S.C.A. 45(c).[10]

JONES, Circuit Judge, Dissenting in part:

It is with regret that I find myself in disagreement with the majority in that portion of the decision which holds that a minority of the Commission can make adjudications. It seems to me that the Congress gave the Commission no such power and I think it cannot assume a power not granted.

It is my belief that the better rule is that of the Ninth Circuit in *Flotill Products, Inc.* v. *F.T.C.*, 358 F. 2d 224, as amended by order filed August 15, 1966. The majority agrees with the Sixth Circuit and the District of Columbia Circuit. The principle that two is a majority of five is as unsound in law as it is in mathematics.

Therefore, I

Dissent in part.

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[9] Paragraph (2) orders petitioners to cease and desist from "(2) Discriminating between foreign and domestic shrimp processors by refusing to sell such machinery to domestic processors upon the same terms and conditions afforded to foreign processors."

[10] *Rayex Corporation* v. *F.T.C.* (1963), 317 F. 2d 290.

APPENDIX F

FEDERAL TRADE COMMISSION ORDERS ISSUED BY A PANEL OF 3 COMMISSIONERS DURING FISCAL YEARS 1962–66

[* INDICATES TWO-TO-ONE DECISION]

Fiscal Year 1962:

1. *Encyclopedia Britannica, Inc.*, 59 F.T.C. 24.
2. *Helbros Watch Co.*, 59 F.T.C. 1377.

Fiscal Year 1963:

1. *Sacks Woolen Co.*, 61 F.T.C. 1226.
*2. *Luria Bros., FTC Docket* 6156, 1961–63 Trade Reg. Rep. Transfer Binder ¶ 16,183, pending C.A. 3, No. 14,402 and 14 separate related petitions.
*3. *Forster Mfg. Co.*, Docket 7207, 1961–63 Trade Reg. Rep. Transfer Binder ¶ 16,243, remanded to Commission, 335 F. 2d 47 (C.A. 1), certiorari denied, 380 U.S. 906, Commission action after remand affirmed, 361 F. 2d 340 (C.A. 1).
4. *National Bakers Services, Inc.*, Docket 7480, 1961–63 Trade Reg. Rep. Transfer Binder ¶ 16,289, affirmed, 329 F. 2d 365 (C.A. 7).
*5. *Borden Co.*, Docket 7129, 1961–63 Trade Reg. Rep. Transfer Binder ¶ 16,191, order set aside, 339 F. 2d 133 (C.A. 5), reversed and remanded, 383 U.S. 637, pending, C. A. 5.

Fiscal Year 1964:

*1. *Atlantic Refining Co.*, Docket 7471, 1961–63 Trade Reg. Rep. Transfer Binder ¶ 16,422, affirmed, 344 F. 2d 599 (C.A. 6), certiorari denied, 382 U.S. 939.

2. *Wilson Chemical Co.*, Docket 8474, 1963–65 Trade Reg. Rep. Transfer Binder, ¶ 16,749.

3. *Ideal Toy Corp.*, Docket 8530, 1963–65 Trade Reg. Rep. Transfer Binder ¶ 16,751.

4. *Filderman Corp.*, Docket 7878, 1963–65 Trade Reg. Rep. Transfer Binder ¶ 16,767.

*5. *State Paint Mfg. Co.*, Docket 8367, 1963–65 Trade Reg. Rep. Transfer Binder ¶ 16,772.

*6. *Borden Co.*, Docket 7474, 1963–65 Trade Reg. Rep. Transfer Binder ¶ 16,776, reversed, 339 F. 2d 953 (C.A. 7).

7–8. *Individualized Catalogues, Inc.; Santa's Playthings, Inc.*, Dockets 7971, 8259, 2 separate Dockets 7971, 8321, 8255, 8259, 4 separate dockets and orders; 1 decision, 1963–65 Trade Reg. Rep. Transfer Binder ¶ 16,873.

9. *ATD Catalogues, Inc.*, Docket 8100, 1963–65 Trade Reg. Rep. Transfer Binder ¶ 16,874.

10. *Billy & Ruth Promotion, Inc.*, Docket 8240, 1963–65 Trade Reg. Rep. Transfer Binder ¶ 16,875.

*11. *Purolator Products, Inc.*, Docket 7850, 1963–65 Trade Reg. Rep. Transfer Binder ¶ 16,877, affirmed, 352 F. 2d 874 (C.A. 7), petition for certiorari pending, No. 61.

12. *Ekco Products Co.*, Docket 8122 1963–65 Trade Reg. Rep. Transfer Binder ¶ 16,879, affirmed, 347 F. 2d 745 (C.A 7).

13. *Continental Products, Inc., Docket* 8517, 1963–1965 Trade Reg. Rep. Transfer Binder ¶ 16,883.
14. *Permanente Cement Co.,* Docket 7939, 1963–1965 Trade Reg. Rep. Transfer Binder ¶ 16,885.
*15. *Pacific Molasses Co. & Bascom Doyle,* Docket 7462, 1963–1965 Trade Reg. Rep. Transfer Binder ¶ 16,916, reversed, 356 F. 2d 381 and 386 (C.A. 5) (separate petitions to review one order).
*16. *Grand Caillou Packing Co.,* Docket 7887, 1963–1965 Trade Reg. Rep. Transfer Binder ¶ 16,927, affirmed in part and reversed in par *sub nom. LaPéyre* v. *Federal Trade Commission,* C.A. 5, No. 21,787, decided September 13, 1966.

Fiscal Year 1965:

*1. *Flotill Products, Inc.,* Docket 7226—instant case.
2. *Inland Container Corp.,* Docket 7993, 1963–1965 Trade Reg. Rep. Transfer Binder ¶ 17,012.
*3. *Dayco Corp.,* Docket 7604, 1963–1965 Trade Reg. Rep. Transfer Binder ¶ 17,029, affirmed in part and reversed in part, 362 F. 2d 180 (C.A. 6).
*4. *Bakers of Washington, Inc., Docket* 8309, 1963–1965 Trade Reg. Rep. Transfer Binder ¶ 17,147, affirmed *sub nom. Safeway Stores, Inc.* v. *Federal Trade Commission,* No. 19,325, and three separate related petitions, decided September 14, 1966.
5. *Beatrice Food Co.,* Docket 6653, 3 Trade Reg. Rep. ¶ 17,244, pending, C.A. 9, No. 20,727.

Fiscal Year 1966:

1. *Lloyd A. Fry Roofing Co.,* Docket 7908, 3 Trade Reg. Rep. ¶ 17,303, pending, C.A. 7, No. 15,389.
2. *B. F. Goodrich,* Docket 6485, 3 Trade Reg. Rep. ¶ 17,424, pending, C.A.D.C., Nos. 20,058 and 20,061.

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